No. 04-1687

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In The
Supreme Court of the United States

ROBERT M. DAVIDSON and
VANESSA E. KOMAR,
Petitioners
v.

VIVRA INC,
MICHAEL J. MEEHAN,
QUARLES BRADY STREICH LANG LLP,
et al
Respondents

On Petition For Writ Of Certiorari
As to Two Final Judgments of the Ninth Circuit
United States Court of Appeals

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners [referred to herein as "Davidsons"] submit this petition for rehearing pursuant to this Court's Rule 44.2 because of "*intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented*". Davidsons filed Petition for Writ of Certiorari (Docket Case No. 04-1087) on June 13, 2005, and Supplemental Brief on August 22, 2005. Certiorari was denied by this Court on October 3, 2005.

I. The final judgments of the Ninth Circuit United States Court of Appeals are void as moot

Final Judgment and Memorandum Decision of April 4, 2005, from Ninth Circuit U.S. Court of Appeals (# 03-17342) and Final Judgment and Memorandum Decision of April 4, 2005, from Ninth Circuit U.S. Court of Appeals (# 04-15304) are void as moot because the Orders of November 24, 2003 (U.S. District Court, Arizona District, Docket No. 56, Civil Case # CV-03-00110-FRZ and February 2, 2004 (U.S. District Court, Arizona District, Docket No. 9, Civil Case # CV-03-00580-FRZ), which dismissed Davidsons' federal causes of action, were ***acts in clear absence of all jurisdiction***. See *Am.Jur. Civil Rights*, Section 105, *C.J.S. Judges*, Section 208, *Am.Jur. Judges*, Section 75, and *C.J.S. Judges*, Section 207. See also *Sharp v. Bivona*, 304 F.Supp.2d 357, *Mireles v. Waco*, 112 S.Ct. 286, *Stamp v. Sparkman*, 98 S.Ct. 1099, and *Hale v. Lefkow*, 239 F.Supp.2d 842.

Federal District Court trial judge Frank R. Zapata had actual knowledge of Michael J. Meehan's ("MJM's") candidacy for the Arizona bench prior to the final Orders by Judge Zapata which dismissed both of Davidsons' federal causes of action. Violations of 28 U.S.C. Section 455(a) can be applied retroactively. ***Only one inference can reasonably be drawn from the evidence. Estoppel may be a question of law, when the facts are not in dispute or are beyond dispute***. See *28 Am. Jur.2d Estoppel and Waiver Section 188.* This Court is referred to the Affidavit and Attachments to Davidsons' Petition for Review to the Arizona Supreme Court on September 21, 2005.

II. The Ninth Circuit United States Court of Appeals applied the wrong standard of review to Davidsons' Appeals

The Ninth Circuit holdings in Davidson v. Meehan, 127 Fed. Appx. 312, have effectively adopted a per se rule which permits dismissal of all Section 1983 complaints against attorneys [and judges], thereby fostering [if not actually encouraging] the most egregious behavior by attorneys [and judges], even if unquestionably the result of pressures by the State. The Ninth Circuit held that privately-retained attorney and law firm cannot violate constitutional rights of clients. This ruling is certain to have been well received by the State Actors in the State Action.

In the federal court proceedings, federal Judge Zapata's dismissal of Davidsons' federal causes of action under color of the abstention doctrine of *Younger v. Harris* was not just "*clearly erroneous*". It was *willfully malicious* towards the whistle-blowers (the Davidsons) and an unconscionable abdication of jurisdiction over Davidsons' federal causes of action (CV-03-00580-FRZ and CV-03-00110-FRZ). ***Judge Zapata's dismissals of Davidsons' federal court proceedings were "actions, though judicial in nature, taken in the complete absence of all jurisdiction"***.

To wit, Judge Zapata was incapable of "*holding the balance true*" between Davidsons' rights and MJM's rights, when he had actual knowledge of MJM's candidacy for the Arizona bench. Judge Zapata's rulings favored MJM's judicial ambitions at the expense of Davidsons' right to fair trial. These rulings represent willful malfeasance by Judge Zapata towards the Davidsons. These rulings give rise to estoppel as a matter of law. Judge Zapata violated his duty to recuse himself when Section 455 (a) applied. Judge Zapata's judicial bias represents structural error in the constitution of the trial process. *"Structural errors" are defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards* ***and require reversal***. See *State v. Dorsey*, 701 N.W.2d 238.

III. Predicate Facts

Davidsons ***very recently*** *(August 2005) learned that Michael J. Meehan ("MJM") was candidate for several vacancies on the bench of Division II of Arizona Court of Appeals ("Division II") and Arizona Supreme Court from 2002 to 2003, both during and prior to the time when Davidsons' federal causes of action [CV-03-00110-FRZ and CV-*03-00580-FRZ) were *before federal trial* Judge *Frank R. Zapata.* Two *federal judges recused themselves from Davidsons' federal cause of action (CV-03-00580-FRZ) against MJM* and QBSL (Judge John M. Roll on December 2, 2003, and Judge David C. Bury on December 29, 2003) before the case was reassigned to Judge Frank R. Zapata on December 29, 2003. Judge Zapata dismissed Davidsons' federal causes of action on November 24, 2003 (U.S. District Court, Arizona District, Docket No. 56, Civil

Case # CV-03-00110-FRZ) and February 2, 2004 (U.S. District Court, Arizona District, Docket No. 9, Civil Case # CV-03-00580-FRZ). Prior to the aforementioned dismissals, Judge Zapata had actual knowledge of MJM's candidacy for vacancies on the Arizona bench. Malice by Judge Zapata toward the Davidsons may be presumed from predicate facts.

This Court is referred to the Affidavit and Attachments to Davidsons' Petition for Review to the Arizona Supreme Court on September 21, 2005, for copies of the newspaper article from the April 15, 2002, issue of the Tucson Citizen, entitled "*7 Tucsonans up for high court seat*". See December 2002, Volume 22, Number 12, page 1, issue of the Maricopa Lawyer. See May 2002, Volume 22, Number 5, page 1, issue of the Maricopa Lawyer. See January 2003, Volume 23, Number 1, page 1, issue of the Maricopa Lawyer. See April 8, 2002, and April 25, 2002, press releases, downloaded from the archives of the Arizona Supreme Court, entitled "*15 Applicants Apply for Arizona Supreme Court Position*" and "*Public Input Sought on Candidates for Supreme Court*", respectively.

These facts are readily verifiable because copies of the newspaper press releases from 2002 and 2003 can be found and downloaded directly from the Arizona Supreme Court internet website. Copies of the newspaper articles can be obtained from archive departments of the Maricopa Lawyer and the Tucson Citizen. These facts provide this Court with more than just vague conclusory allegations of structural bias in the federal court proceedings.

Davidsons lacked knowledge and the means of knowledge of the truth as to the facts in question [referenced above]. Davidsons relied, in good faith, on the conduct or statements of federal trial judge Frank R. Zapata. Davidsons acted or refrained from acting because of the conduct or statements of Judge Zapata. Davidsons action or inaction was of such a character as to cause a change in their position or status to their injury, detriment, and prejudice. Davidsons did not learn of the above-mentioned facts, until very recently (August 2005), due to the fact that the Davidsons have resided in Texas since January 2002, and had no reason to subscribe to the Tucson Citizen, nor did they have any reason to subscribe to the Maricopa Lawyer, nor any reason to search the archives of the Arizona Supreme Court. ***It is only by the Grace of God that Davidsons learned of these facts at all. Davidsons exceptionally diligent effort in monitoring the lawsuit [and Divine Intervention] establish the exceptional circumstances justifying relief***. While motions for relief under Federal Rule of Civil Procedure 60(b)(6) should be made to the court that rendered the judgment, Davidsons did not learn of MJM's candidacy for the Arizona bench until August 2005. Thus Davidsons did not learn until *very recently* that federal trial judge

Frank R. Zapata with a high degree of likelihood [virtual certainty] had *actual knowledge* of MJM's candidacy for the Arizona bench while Davidsons' federal cases were pending. Davidsons have made a strong showing of *actual bias* by the federal trial judge in the federal court proceedings.

IV. Bias and partiality in the federal court proceedings

The appearance of bias and partiality was created by actual knowledge of MJM's candidacy for the Arizona bench by federal trial judge Frank R. Zapata, prior to the rulings which dismissed Davidsons' federal causes of action. See *Waller v. U.S.*, 112 S.Ct. 2321. Violations of 28 USC Section 455(a) which require judges to disqualify themselves in any proceeding in which their impartiality might reasonably be questioned does not require scienter. Davidsons move this Court for relief from the final Judgments in the federal court proceedings under Fed. R. Civ. P. 60 (b)(6). 28 USC Section 455 (a) required the federal court trial judge to recuse himself, and this statute can be applied retroactively. The risk of injustice to Davidsons, risk of injustice in other cases if relief is denied, and risk of undermining the public's confidence, are all far too great to deny vacatur of the final Judgments in the Federal trial court under Rule 60 (b) (6). The final Judgments in the Federal court proceedings should be vacated based on an appearance of impropriety that permeates the entire proceedings. The reasonable person standard applies. "*The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact*". MJM's candidacy for the Arizona bench while Davidsons' federal court proceedings were pending gives rise to estoppel as a matter of law. See *Liljeberg v. Health Services Acquisition Corp*, 108 S.Ct. 2194.

V. Structural errors in the federal court proceedings

"Structural errors" are defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards ***and require reversal***. See *State v. Dorsey*, 701 N.W.2d 238. See *Arizona v. Fulminante*,111 S.Ct. 1246. See *In re: Initial Public Offering Securities Litigation*, 174 F.Supp.2d 70. Unlike federal judges John M. Roll and David C. Bury, Frank R. Zapata did not recuse himself from Davidsons' federal cause of action (CV-03-00580-FRZ) against Davidsons' former attorney and his law firm. The due process clause of the U.S. Constitution entitles a person to an impartial and

disinterested tribunal in both civil and criminal cases. The federal court proceedings violated Davidsons' constitutional rights. Submission to a fatally biased adjudicator constitutes ongoing, independent injury that requires immediate judicial relief. The test for recusal is an objective one and asks whether, from the perspective of "*the average person on the street,*" a reasonable man knowing all of the circumstances "*would harbor doubts about the judge's impartiality.*" See *U.S. v. Poludniak*, 657 F.2d 948. Federal trial judge Zapata is estopped from dismissing Davidsons' federal court proceedings as a matter of law. Judge Zapata's inexcusable failure to recuse himself when required to do so by 28 U.S.C. Section 455 (a) constitutes an extraordinary circumstance warranting relief once the failure came to light. By failing to recuse himself, Judge Zapata's final Judgments which dismissed both of Davidsons' federal causes of action are judicial acts "*in clear absence of all jurisdiction*" for which there should be no immunity from liability in connection with such acts.

VI. Abdication of federal jurisdiction

Davidsons are not the only victims of Judge Zapata's willful misconduct. The "*endangered and dead*" victims referred to in Davidsons' Petition for Writ of Certiorari before Judgment (U.S. Supreme Court Docket Case # 04-537, certiorari denied on January 10, 2005), Issue # 2, at page 17, paragraph 1, had to collectively shudder when Judge Zapata dismissed Davidsons' federal causes of action (CV-03-00110-FRZ and CV-03-00580-FRZ). A foreseeable consequence of his abdication of federal jurisdiction, is that the harm (intentional endangerments and deaths) made possible under color of the Prescription Drug User Fee Act ("PDUFA") will continue unabated and evade review.

CERTIFICATION UNDER RULE 44.2

Pursuant to this Court's Rule 44.2, Davidsons hereby certify that this Petition for Rehearing is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Davidsons hereby also certify that this Petition for Rehearing is presented in good faith and not for delay.